

Minutes of the Telephonic Meeting of the
Arizona Game and Fish Commission
Monday, March 3, 2008
Arizona Game and Fish Department
5000 W. Carefree Highway
Phoenix, AZ 85086

PRESENT: (Commission)

(Director's Staff)

Via telephone:

Chairman William H. McLean
Vice Chairman Robert D. Hernbrode
Commissioner Jennifer L. Martin
Commissioner Robert R. Woodhouse
Commissioner Michael M. Golightly

In person:

Director Duane L. Shroufe
Deputy Director Steve K. Ferrell
Assistant Attorney General Jim Odenkirk

Director Shroufe conducted roll call and all five Commissioners were present via telephone. Chairman McLean called the meeting to order at 9:00 a.m. Several Department staff members and two members of the public were present. Todd Rathner, representing the National Rifle Association, was present via telephone. This meeting followed an agenda dated February 28, 2008.

* * * * *

1. State and Federal Legislation

Presenter: Anthony Guiles, Legislative Liaison

Mr. Guiles briefed the Commission on the status of the proposed bill, HCR 2037; constitutional rights; game and fish. This bill was held last week in the House Natural Resources Committee. The sponsor and Chairman of the Committee asked the Department to meet with representatives of the National Rifle Association (NRA) to try and find a solution to Commission concerns in alternative language for the bill. (Commission concerns with HCR 2037 are outlined in the minutes from the February 21, 2008 Telephonic Commission meeting.) This bill is scheduled to be heard in the House Natural Resources Committee on Wednesday of this week and this is the last week for the House to hear bills. Commission concerns were in regards to Section 36 of the bill (attachment #1). The Commission was provided with proposed amendment language to Section 36 (attachment #2) for discussion.

Public Comment

Suzanne Gilstrap, Arizona Sportsmen for Wildlife (ASFW), addressed the Commission and encouraged them to try to find some middle ground on this issue.

Mr. Rathner, representing the NRA, discussed the proposed amendment language with the Commission. The NRA supports the Commission system and believes that the language would protect the existence of current statutes and rules. Further discussed was the word "right" versus "privilege" and that the intent was to protect hunting.

* * * * *

Executive Session

The Commission voted to meet in Executive Session in accordance with A.R.S. § 38-431.03 (A)(3) and (4) for the purpose of discussion and consultation with legal counsel.

Motion: Martin moved and Golightly seconded THAT THE COMMISSION VOTE TO GO INTO EXECUTIVE SESSION.

Vote: Unanimous

* * * * *

Meeting recessed until 11:00 a.m.

* * * * *

Director Shroufe conducted roll call and confirmed that all five Commissioners were present via telephone. Todd Rathner was also present via telephone.

1. (continued) State and Federal Legislation

Presenter: Anthony Guiles, Legislative Liaison

During the recess, Mr. Odenkirk made several changes to the proposed amendment language (attachment #3) as directed by the Commission in Executive Session. Copies were distributed/mailed to the participants/attendees of this meeting followed by discussion.

Public Comment

Stephanie Nichols-Young, Animal Defense League of Arizona (ADLA), confirmed with the Commission that they had not yet approved the amended language and that it was still subject to discussion and change. Ms. Nichols-Young wanted to reserve the opportunity to participate in discussions as this moves forward.

Suzanne Gilstrap, ASFW, stated that discussions were moving in the right direction, but she would like to present these changes to ASFW's legal assistance.

Chairman McLean suggested that the Commission recess to allow Mr. Rathner and Ms. Gilstrap the opportunity to discuss the changes with their attorneys.

Motion: Woodhouse moved and Golightly seconded THAT THE COMMISSION VOTE TO RECESS UNTIL 3:00 PM.

Vote: Unanimous

* * * * *

Meeting recessed until 3:00 p.m.

* * * * *

Director Shroufe conducted roll call and confirmed that all five Commissioners were present via telephone. Mr. Rathner was present via telephone, and for this portion of the meeting, Mr. Odenkirk and Ms. Nichols-Young were present via telephone.

1. (continued) State and Federal Legislation

Presenter: Anthony Guiles, Legislative Liaison

Mr. Rathner provided additional changes made by NRA attorneys (attachment #4) to the draft amendment as proposed by the Commission. Copies were distributed/emailed to the participants/attendees of this meeting followed by discussion and debate on the wording and language, including changes to “public trust”, “traditional methods”, and the deletion/change to the reference to “strict scrutiny” and “trespass”.

Public Comment

Suzanne Gilstrap, ASFW, commented on the “strict scrutiny” issue and suggested that an intent clause be inserted into the language. Ms. Gilstrap supported Mr. Rathner’s position and stated that while the Commission may feel some risk with the wording, she believed the sportsmen of the State would be willing to except a little bit of risk to have something this critical in place.

Stephanie Nichols-Young, ADLA, commented that the Commission was trying to insert something into the declaration of rights that really isn’t a fundamental right and that they couldn’t do that without creating a huge ambiguity and a huge problem for the Commission and the Department in the future.

After further discussion, Chairman McLean suggested that the Commission move forward on this issue if possible.

Motion: Golightly moved THAT THE COMMISSION VOTE TO APPROVE THE LANGUAGE PROVIDED BY MR. ODENKIRK AS DIRECTED BY THE COMMISSION (ATTACHMENT # 3) WITH THE FOLLOWING EXCEPTIONS: 1) INSERT THE WORDS “ENACTED BY THE LEGISLATURE” AFTER THE WORD “ESTABLISHED” (PARAGRAPH B); 2) STRIKE “FISH AND” AND REINSERT THE WORD “NON-THREATENED” (PARAGRAPH B); 3) STRIKE THE WORDS “BE CONSTRUED TO” (PARAGRAPH C); STRIKE THE WORDS “GAME ANIMALS” AND INSERT THE WORD “WILDLIFE” (PARAGRAPH A AND C); 4) AND INSERT THE WORD “ENACTED” AFTER “REASONABLE STATUTES” (PARAGRAPH A).

Motion died for lack of second.

Motion: Woodhouse moved THAT THE COMMISSION VOTE TO CONSIDER THE LANGUAGE PRESENTED BY MR. RATHNER SUBJECT TO FURTHER DISCUSSION.

Motion died for lack of second.

After further discussion, the Commission's vote from the February 21, 2008 Commission meeting still stands to oppose HCR 2037. This item will be further discussed at the March 8, 2008 Commission meeting.

* * * * *

2. Call to the Public

There were no requests from the public to speak.

* * * * *

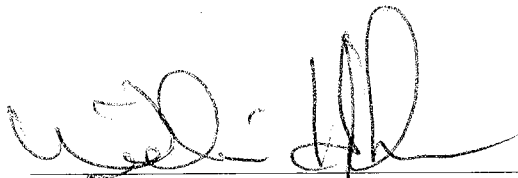
Motion: Hernbrode moved and Martin seconded THAT THE COMMISSION VOTE TO ADJOURN THIS MEETING.

Vote: Unanimous

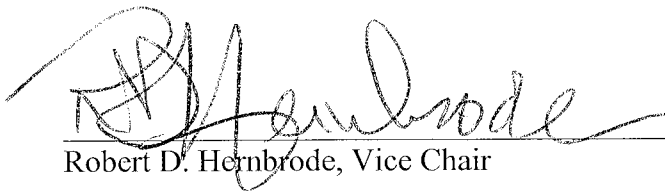
* * * * *

Meeting adjourned at 4:11 p.m.

* * * * *



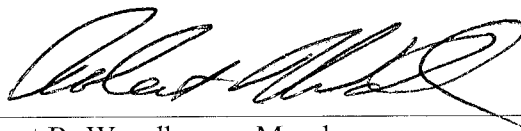
William H. McLean, Chair



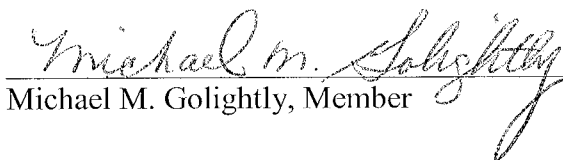
Robert D. Hernbrode, Vice Chair



Jennifer L. Martin, Member

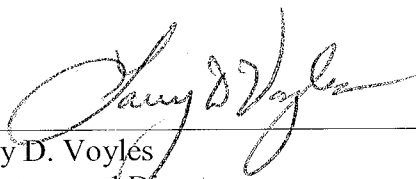


Robert R. Woodhouse, Member



Michael M. Golightly, Member

ATTEST:



Larry D. Voyles
Secretary and Director

ATTACHMENT # 1

REFERENCE TITLE: constitutional rights; game and fish

State of Arizona
House of Representatives
Forty-eighth Legislature
Second Regular Session
2008

HCR 2037

Introduced by
Representatives Weiers JP, Adams, Barnes, Barto, Boone, Mason, Tobin, Senator Gray L: Representatives
Brown, Burges, Campbell CH, Campbell CL, Crandall, Crump, DeSimone, Driggs, Farley, Gallardo,
Lopez, Lujan, McGuire, McLain, Murphy, Nichols, Pancrazi, Paton, Pearce, Prezelski, Tom, Yarbrough

A CONCURRENT RESOLUTION

**PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE II,
CONSTITUTION OF ARIZONA, BY ADDING SECTION 36; RELATING TO HUNTING AND FISHING.**

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it resolved by the House of Representatives of the State of Arizona, the Senate concurring:

1. Article II, Constitution of Arizona, is proposed to be amended by adding section 36 as follows if approved by the voters and on proclamation of the Governor:

36. Hunting, fishing and harvesting game animals

SECTION 36. A. THE RIGHT OF CITIZENS TO HUNT, FISH AND HARVEST GAME ANIMALS ON PUBLIC AND PRIVATE PROPERTY CONSISTENT WITH THE LAW OF TRESPASS SHALL NOT BE IMPAIRED AND IS SUBJECT ONLY TO REASONABLE REGULATIONS AND RESTRICTIONS SPECIFICALLY PRESCRIBED BY THE LEGISLATURE.

B. CONSISTENT WITH THE PUBLIC TRUST TO CONSERVE BIRDS, GAME ANIMALS, FISH AND WILDLIFE, TRADITIONAL METHODS MAY BE USED TO TAKE NONTREATED SPECIES, TRADITIONALLY PURSUED.

C. PUBLIC HUNTING, FISHING AND HARVEST ARE PREFERRED MEANS OF MANAGING AND CONTROLLING NONTREATED WILDLIFE.

2. The Secretary of State shall submit this proposition to the voters at the next general election as provided by article XXI, Constitution of Arizona.

clear

Section 36.

A. The right of citizens of this state to hunt, fish and harvest game animals is subject only to reasonable rules, regulations and restrictions prescribed by the legislature.

B. Consistent with the public trust to conserve birds, game animals, fish and wildlife, traditional methods shall be preserved to take non-threatened species, traditionally pursued.

C. Public hunting, fishing and harvest are preferred means of managing and controlling non-threatened wildlife.

D. Nothing in this section shall be construed to invalidate any statutes, rules, or regulations, which are in effect on the date of enactment of this section. This section does not create a right to trespass.

ATTACHMENT # 3

Section 36

A. The right of citizens of this state to hunt, fish and harvest game animals is subject only to reasonable statutes by the legislature and administrative regulations, rules, and restrictions prescribed by the legislature.

B. ~~Consistent with the public trust to conserve birds, game animals, fish and wildlife, traditional methods shall be preserved to take non-threatened species, traditionally pursued.~~

BE. The public trust in fish and wildlife is hereby established. Consistent with the public trust to conserve fish and wildlife, pPublic hunting, fishing and harvest are preferred means of managing and controlling fish and non-threatened wildlife.

CD. Nothing in Tthis section shall not be construed to invalidate any statutes, or administrative rules, or regulations, which are in effect on the date of enactment of this section. Statutes and administrative rules existing on the date of enactment, and statutes and administrative rules enacted or approved after the date of enactment that in any manner burden the right of the citizens to hunt, fish and harvest game animals are entitled to deference and shall not be subject to a strict scrutiny standard of review. This section does not create a right to trespass.

ATTACHMENT # 4

Section 36

A. The right of citizens of this state to hunt, fish and harvest game animals is subject only to reasonable statutes ENACTED by the legislature and administrative regulations, rules, and restrictions prescribed by the legislature.

B. ~~Consistent with the public trust to conserve birds, game animals, fish and wildlife, traditional methods shall be preserved to take non-threatened species, traditionally pursued.~~

BC. ~~The public trust in fish and wildlife is hereby established. Consistent with the public trust to conserve fish and wildlife, TRADITIONAL METHODS SHALL BE PRESERVED TO TAKE NONTHREATENED SPECIES. PpPublic hunting, fishing and harvest~~ING are preferred means of managing and controlling NONTHREATENED fish and non-threatened wildlife.

CD. ~~Nothing in T~~his section shall not be construed to invalidate any statutes, or administrative rules, or regulations, which are in effect on the date of enactment of this section. Statutes and administrative rules existing on the date of enactment, and statutes and administrative rules enacted or approved after the date of enactment that in any manner burden the right of the citizens to hunt, fish and harvest game animals are entitled to deference and shall not be subject to a strict scrutiny standard of review. . "Nothing in this amendment shall be construed to modify any provisions of common law or statutes relating to trespass, eminent domain, or any other property rights. This section does not create a right to trespass.

End

It does not make sense to include the provision stating that the public trust is being established because this was done long ago. It is recognized under common law.

It is already recognized at common law. Begay v. Sawtelle, 53 Ariz. 304, 306, 88 P.2d 999 (1939), expressed the public trust doctrine as follows: "Under the common law, the title to game animals and fish was held to be in the state for the use and benefit of its citizens, and the killing or taking and use of such game was subject to governmental control and regulation in the interest of the common good."

The standard of review language is simply too unsightly to be accepted as a constitutional provision. Constitutions deserve more reverence. The "reasonableness" standard is clear enough and is a standard appropriate for constitutional language. It's anything but "strict scrutiny." This along with the new provision that explicitly protects existing laws and rules makes it eminently clear to any court that deference is to be given to them and strict scrutiny does not apply. The courts in Arizona have a well-established track record of siding with government in these cases and all of this language will ensure that this continues.

Here are two "deference" cases that can be pointed to:

"we note that the 2005 ordinance, as a legislative decision, is entitled to deference." Robson Ranch Quail Creek, LLC v. Pima County, 215 Ariz. 545, 551, 161 P.3d 588 (Ariz.App. Div. 2,2007).

"an administrative agency's interpretation of statutes and its own regulations is entitled to deference. Capitol Castings, Inc. v. Arizona Dep't. of Economic Sec., 171 Ariz. 57, 60, 828 P.2d 781, 784 (App.1992)." Carondelet Health Services, Inc. v. Arizona Health Care Cost, 182 Ariz. 221, 225, 895 P.2d 133 (Ariz.App. Div. 1,1994).